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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JONATHAN F. DAVIS, Defendant and Appellant.	B205534 (Los Angeles County Super. Ct. No. BA329207)

APPEAL from a judgment of the Superior Court of Los Angeles County, Thomas K. Herman, Judge. Affirmed.

John F. Schuck, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Stephanie A. Miyoshi and David A. Wildman, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

The information charged defendant Jonathan F. Davis with two counts of resisting with force an executive officer performing his lawful duty (§ 69)[1] and alleged two prior convictions (§ 667.5, subd. (b)). A jury convicted defendant of both offenses, following which defendant admitted the prior convictions. The court sentenced him to a term of three years and eight months.

Defendant's appeal raises only one contention: a claim that he was prejudiced by brief testimony referring to gangs. We are not persuaded. We therefore affirm the judgment.

STATEMENT OF FACTS

Defendant's convictions are based upon an altercation he had with Los Angeles County Deputy Sheriffs Victor Velasquez and Victor Lima while he was being held at the Twin Towers Correctional Facility. Both deputies testified at the trial. Taken together, their testimony established the following sequence of events.

The confrontation occurred in the early evening of August 14, 2007. Defendant was permitted to leave his cell to go to the day room to receive dinner. In the day room, a trustee, erroneously believing defendant had a cellmate, handed him two trays of food. Deputy Velasquez, who was in an enclosed deputy booth with a full view of the area, saw that defendant had two trays. The deputy, using the public address system, told defendant to return the second tray. Defendant refused, stating: "Fuck that. I'm on lockdown anyway." Defendant returned to his cell, put the two trays down, grabbed a towel and soap, and went to the shower area. Deputy Velasquez used the public address system to tell defendant to return

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[1] All undesignated statutory references are to the Penal Code.

to his cell. Defendant proceeded to take a shower. At this point, Deputies Velasquez and Lima walked to the shower area. Deputy Velasquez told defendant to return to his cell because he did not have permission to take a shower. Defendant stepped out of the shower. As he walked away, he pulled down his shorts and said: "You know, I don't care. My balls are clean anyway. It don't matter." Once inside of his cell, defendant loudly yelled: "Fuck this. You can't lock me down forever."

Deputy Velasquez was fearful that defendant's loud remarks would incite other inmates to take inappropriate action against jail staff. Consequently, the deputies handcuffed defendant and walked him to the outdoor recreation area to remove him from the other inmates. As the three entered the recreation area, defendant kicked first Deputy Lima and then Deputy Velasquez. Deputy Velasquez pulled defendant to the ground. Defendant continued to kick the deputies and attempted to head-butt them. Defendant ignored their commands to cease resisting. The deputies ultimately subdued him.

Defendant presented no evidence about the events.

DISCUSSION

Defendant's contention that prejudicial gang evidence was introduced is based upon very brief testimony from Deputy Velasquez given in the following context. The prosecutor asked the deputy why he decided to isolate defendant by taking him to the outdoor recreation area. Deputy Velasquez responded that he was concerned defendant was going to incite other inmates. When the prosecutor asked him how many times something like that had occurred, defense counsel objected. The court overruled the objection. It explained: "I think that part of the explanation what the duties and responsibilities of a custodial officer are is a reasonable explanation of what it takes in order to provide security, which is part

of their responsibility. [¶] . . . I think a reasonable inquiry into this deputy's experience in relation to this particular issue, it helps explain why he did what he did . . . from his point of view." The following colloquy then occurred.

> "[The Prosecutor]: So, again, deputy, what have you seen in the past?
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> "[Deputy Velasquez]: In the past, my experience working at Twin Towers, I have no – I have seen personally you have certain individuals that they would call, like, a shot-caller, which is like the head of that certain group of people in the jail systems. Especially in Twin Towers.
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> "You have inmates that separate into the racial groups. And I've seen in the past Hispanic – *the Hispanic gang members*, you have one person – individual in there that they call the shot-caller. If he gives the word for all the other inmates to be hostile towards staff, all those other inmates basically obey him and they will all, regardless if it was right or wrong, follow his commands and act out against staff." (Italics added.)

Defense counsel, citing Evidence Code section 352, objected and moved to strike. The court overruled the objection and Deputy Velasquez continued his testimony. No other reference to gangs was made.

On cross-examination, Deputy Velasquez conceded that defendant, other than yelling out, had not incited other inmates to violence. The deputy also testified that he did not know if defendant had ever incited any riots in the facility.

Shortly thereafter, defense counsel moved for a mistrial based upon Deputy Velasquez's brief reference to gangs. Defense counsel argued:

> "[The deputy] was basically talking about what he thought was inciting a riot when [defendant] was yelling, which has been kind of a focal point of this case in terms of why he felt he needed to isolate him in this recreation room.

> "And what he started talking about was gangs. And I think he used that word. And I believe he was specifically referencing a Hispanic gang, which I thought was very prejudicial. I mean, that – just the mention of the word 'gang' in any kind of case just changes the whole tenor of the case and how people perceive things given how violent gang members can be and the kinds of activities they engage in.
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> "And I think that that was very prejudicial for the officer to just throw that in there knowing that this case has nothing to do with gangs, knowing from experience how prejudicial that kind of information could be, knowing that this particular incident had nothing to do with gangs, that there was never any gangs mentioned.
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> "The word 'gang,' if you did a key word search with this police report, it never would even come up."

Defense counsel's argument concluded with the claim that Deputy Velasquez's reference to gangs had "prejudiced [defendant] to the point where I don't think he can get a fair trial." The court denied the motion, stating: "I don't think that it's sufficiently prejudicial to justify a mistrial."

Based upon the record set forth above, defendant contends that he "was prejudiced by Deputy Velasquez's testimony about gangs. The trial court therefore erred when it overruled [his] Evidence Code section 352 objection and denied his mistrial motion; reversal is required." (Boldface and capitalization omitted.) We are not persuaded.

For one thing, defendant misframes the issue as being about the introduction of gang evidence. There was no testimony about gangs. Instead, Deputy Velasquez simply explained why his prior experiences led him to be concerned about defendant's loud outbursts which could be heard by the other inmates. In particular, he was concerned that defendant would incite others to violence. For that reason, he decided to take defendant outside. In the course of giving that

explanation, the deputy made a passing reference to how *Hispanic* gangs had incited violence inside of the institution. However, the deputy never testified that defendant (who is African-American) had any gang affiliation or that defendant's misconduct was gang-related. On this record, the trial court did not abuse its discretion in overruling defendant's Evidence Code section 352 objection and finding that the testimony was relevant to explain the deputies' concerns and to establish that they were acting in their official capacities when defendant resisted their actions by force.[2] (*People v. Jablonski* (2006) 37 Cal.4th 774, 805 [appellate court applies abuse of discretion standard of review to a trial court ruling finding evidence to be probative].) Similarly, the trial court did not abuse its discretion in denying the subsequent motion for a mistrial. (*People v. Bolden* (2002) 29 Cal.4th 515, 555 ["A trial court should grant a mistrial only when a party's chances of receiving a fair trial have been irreparably damaged, and we use the deferential abuse of discretion standard to review a trial court ruling denying a mistrial"].)

In any event, any error in permitting the brief testimony (and we find no error) was harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) The evidence of defendant's guilt was overwhelming. Both Deputy Velasquez and Deputy Lima testified about defendant's assaultive behavior. Further, the prosecutor made no improper reference to gangs in his closing argument. And defense counsel simply argued that the dispositive issue was whether the two deputies were credible. Consequently, defendant's argument that "the jurors may have felt that [he] had

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[2] CALCRIM No. 2652 explained to the jury that in order to convict defendant of both counts, the People were required to prove, among other things: "1. The defendant used force or violence to resist an executive officer; [¶] 2. *When the defendant acted, the officer was performing his or her lawful duty*; AND [¶] 3. When the defendant acted, he knew the executive officer was performing his or her duty." (Italics added.)

some relationship with a racial gang, and could have considered that belief in finding him guilty" is unsupported speculation.

Lastly, we reject defendant's claim that the admission of the evidence denied him due process. Even an erroneous admission of evidence under state law (a finding we do not make) does not violate due process unless it renders the trial fundamentally unfair. (*People v. Partida* (2005) 37 Cal.4th 428, 439.) That did not happen in this case.

DISPOSITION

The judgment is affirmed.

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.